Supreme Court, U.S.
FILED
JUL 3 1991
OFFICE OF THE CLERK

No. 90-1156

In the Supreme Court of the United States

OCTOBER TERM, 1991

NEW ORLEANS PUBLIC SERVICE, INC., PETITIONER

v.

THE COUNCIL OF THE CITY OF NEW ORLEANS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION AS AMICI CURIAE SUPPORTING PETITIONER

JOHN G. ROBERTS, JR.
Acting Solicitor General

LAWRENCE G. WALLACE
Deputy Solicitor General

STEPHEN L. NIGHTINGALE
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

WILLIAM S. SCHERMAN
General Counsel

JEROME M. FEIT
Solicitor

THOMAS J. LANE
Attorney
Federal Energy Regulatory Commission
Washington, D.C. 20426

QUESTION PRESENTED

Whether *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 487 U.S. 354 (1988), and *Nantahala Power & Light Co.* v. *Thornburg*, 476 U.S. 953 (1986), entitle an electric utility that is a member of an integrated multi-state holding company system to recover in retail rates its share, as mandated by the Federal Energy Regulatory Commission, of the costs of an electric generating facility that supplies power to members of the system.

TABLE OF CONTENTS

	Page
Interest of the United States and the Federal Energy Regulatory Commission	1
Statement	2
Summary of argument	11
Argument:	
The Council's order is preempted because it interferes with FERC's exclusive jurisdiction to regulate interstate wholesale sales of electric power among the members of the MSU system	13
A. *Nantahala* and *Mississippi Power & Light* specifically foreclose the Council's disallowance of FERC-mandated costs	14
B. The fact that the Council's disallowance is tied to NOPSI's assertedly imprudent failure to sell off its Grand Gulf participation is immaterial	15
1. FERC had jurisdiction to determine whether it was imprudent for NOPSI to retain its interest in Grand Gulf	16
2. The Council's order undercuts FERC's ratemaking authority	21
C. *NOPSI III* did not approve the Council's prudence inquiry	25
Conclusion	27

TABLE OF AUTHORITIES

Cases:

Arizona Public Serv. Co.:	
25 F.E.R.C. ¶ 63,025 (1983)	19
27 F.E.R.C. ¶ 61,185 (1984)	19
Arkansas Louisiana Gas Co. v. *Hall*, 453 U.S. 571 (1981)	25
Burford v. *Sun Oil Co.*, 319 U.S. 315 (1943)	9
City of Tacoma v. *Taxpayers of Tacoma*, 357 U.S. 320 (1958)	20

Cases—Continued: Page

Connecticut Power & Light Co., 43 F.E.R.C. ¶ 63,029 (1988), aff'd, 48 F.E.R.C. ¶ 61,139 (1989) 18, 19
FPC v. *Southern California Edison Co.*, 376 U.S. 205 (1964) 16, 21
Kansas Gas & Electric, 39 F.E.R.C. ¶ 63,013 (1987), aff'd, 49 F.E.R.C. ¶ 61,295 (1989) 19
Kentucky West Virginia Gas Co. v. *Pennsylvania Public Utility Comm'n*, 837 F.2d 600 (3d Cir.), cert. denied, 488 U.S. 941 (1988) 25
Middle South Energy, Inc.:
26 F.E.R.C. ¶ 63,044 (1984) 2, 4, 6, 24
31 F.E.R.C. ¶ 61,305 (1985) 4, 5, 6, 13, 14, 16, 20, 24
32 F.E.R.C. ¶ 61,425 (1985) 4, 5, 6, 17, 22
Middle South Services, Inc., 30 F.E.R.C. ¶ 63,030 (1985) 3, 4, 20
Mississippi ex rel. Pittman v. *Mississippi Public Serv. Comm'n*, 506 So. 2d 978 (Miss. 1987) 7
Mississippi Industries v. *FERC*, 808 F.2d 1525, modified, 822 F.2d 1103 (D.C. Cir.), cert. denied, 484 U.S. 985 (1987) 4-5, 21
Mississippi Power & Light Co. v. *Mississippi ex rel. Moore*, 487 U.S. 354 (1988) ..... *passim*
Montana-Dakota Utilities Co. v. *Northwestern Public Serv. Co.*, 341 U.S. 246 (1951) 14
Nantahala Power & Light Co. v. *Thornburg*, 476 U.S. 953 (1986) 2, 14, 25
New England Power Co., 31 F.E.R.C. ¶ 61,047 (1985), aff'd *sub nom. Violet* v. *FERC*, 800 F.2d 280 (1st Cir. 1986) 19
New Orleans Public Service, Inc. v. *Council of the City of New Orleans*, 491 U.S. 350 (1989) 2, 9, 10, 25, 26
NOPSI v. *City of New Orleans*, 782 F.2d 1236, modified, 798 F.2d 858 (5th Cir. 1986), cert. denied, 481 U.S. 1023 (1987) 9
NOPSI v. *Council of the City of New Orleans*, 833 F.2d 583 (5th Cir. 1987) 9
NOPSI v. *Council of the City of New Orleans*, 850 F.2d 1069 (5th Cir. 1988) 9

Cases—Continued: Page

Northwest Central Pipeline Corp. v. *Kansas*, 489 U.S. 493 (1989) 20, 21
Pike County Light & Power Co. v. *Pennsylvania Public Utility Comm'n*, 77 Pa. Comm. 268, 465 A.2d 735 (1983) 25
Schneidewind v. *ANR Pipeline Co.*, 485 U.S. 293 (1988) 21
System Energy Resources, Inc., 41 F.E.R.C. ¶ 61,238 (1987), on reh'g, 42 F.E.R.C. ¶ 61,091 (1988), aff'd *sub nom. City of New Orleans* v. *FERC*, 875 F.2d 903 (D.C. Cir. 1989), cert. denied, 110 S. Ct. 1805 (1990) 5
United States v. *Public Utilities Comm'n*, 345 U.S. 295 (1953) 16
United States Railroad Retirement Bd. v. *Fritz*, 449 U.S. 166 (1980) 18
Younger v. *Harris*, 401 U.S. 37 (1971) 9

Constitution and statutes:

U.S. Const. Art. VI, Cl. 2 (Supremacy Clause) 2
Federal Power Act, Tit. II, 16 U.S.C. 824 *et seq.*:
§ 201(b), 16 U.S.C. 824(b) 1, 13
§ 205(a), 16 U.S.C. 824d(a) 4
§ 205(c), 16 U.S.C. 824d(c) 13
§ 206(a), 16 U.S.C. 824e(a) 4, 13

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 90-1156

NEW ORLEANS PUBLIC SERVICE, INC., PETITIONER

v.

THE COUNCIL OF THE CITY OF NEW ORLEANS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION AS AMICI CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION

Under Title II of the Federal Power Act, 16 U.S.C. 824(b), FERC has exclusive regulatory authority over the rates charged by public utilities for "the sale of electric energy at wholesale in interstate commerce." Specifically, FERC has exclusive jurisdiction to determine whether the rates charged in such sales—or the rules, regulations, practices, and contracts affecting the rates—are just and reasonable, and not unduly discriminatory

or preferential. Exercising that authority, FERC has issued orders allocating the cost of the nuclear generating capacity of a multi-state public utility holding company system among the operating utilities in the system. In this case, the court of appeals held that the Council of the City of New Orleans, which sets the retail rates for one of those utilities (petitioner), may prohibit petitioner from recovering, from its retail customers, a substantial portion of the costs allocated to it by FERC. If allowed to stand, the court of appeals' decision would nullify FERC's orders allocating costs among the four operating companies and undercut the Commission's exclusive jurisdiction under the Federal Power Act.

We participated, on behalf of the United States and FERC as amici curiae, in two prior cases presenting similar challenges to FERC's exclusive authority under the Federal Power Act, *Nantahala Power & Light Co.* v. *Thornburg*, 476 U.S. 953 (1986), and *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 487 U.S. 354 (1988). We also participated at an earlier stage of this case in which this Court held that abstention was not appropriate. *New Orleans Public Service, Inc.* v. *Council of the City of New Orleans*, 491 U.S. 350 (1989).

STATEMENT

This case is the latest chapter in extended litigation over who should bear the costs of the Grand Gulf 1 nuclear power plant in Port Gibson, Mississippi. In the course of establishing just and reasonable rates for utilities in an integrated power pool, FERC assigned specified shares of those costs to petitioner, New Orleans Public Service, Inc. (NOPSI), and three other affiliated utilities. In *Mississippi Power & Light*, 487 U.S. at 373, this Court held that the Supremacy Clause required Mississippi to permit one of those utilities to recover the costs imposed by FERC's order from the utility's retail customers. In this case, the New Orleans City Council has entered an order excluding a portion of NOPSI's

FERC-mandated share of Grand Gulf costs from its retail rates. The question presented is whether that order intrudes upon FERC's exclusive jurisdiction under the Federal Power Act.

1. *The Middle South System.*—NOPSI is one of four operating subsidiaries belonging to an integrated holding company system that provides power in the States of Louisiana, Arkansas, Missouri, and Mississippi. The other operating subsidiaries are Louisiana Power & Light (LP&L), Mississippi Power & Light Company (MP&L), and Arkansas Power & Light Company (AP&L). All of the voting stock of the operating utilities is owned by Entergy Corp., a successor to Middle South Utilities, Inc. (MSU). Each operating utility runs generating facilities, buys and sells power at wholesale (among themselves and with outside companies), and sells to retail customers in separate service areas. *Mississippi Power & Light*, 487 U.S. at 357. See *Middle South Services, Inc.*, 30 F.E.R.C. ¶ 63,030, at 65,141-65,142 (1985); *Middle South Energy, Inc.*, 26 F.E.R.C. ¶ 63,044, at 65,095 (1984); Pet. App. 3A-4A.

All of the electric power in the system is distributed through a dispatch center in Pine Bluff, Arkansas. Transactions among the operating companies, including the sale and exchange of capacity and energy, have been governed by a series of "System Agreements" filed with FERC. These agreements "have provided the basis for planning and operating the companies' generating units on a single-system basis and for equalizing cost imbalances among the four companies." 487 U.S. at 357. See 30 F.E.R.C. at 65,141-65,142.

Under the System Agreements, a systemwide Operating Committee, made up of representatives of MSU and its subsidiaries, has coordinated system planning with respect to such matters as generating capacity and sales of bulk power. Before the Grand Gulf project, the individual operating utilities bore responsibility for constructing generating facilities. In 1974, however, when

it became apparent that MP&L would be unable to finance Grand Gulf on its own, a new MSU subsidiary, Middle South Energy (MSE), was formed to own and finance Grand Gulf 1 and to sell its power. Grand Gulf 1 proved far more expensive to build than anticipated. Alhtough the cost of two Grand Gulf units was originally estimated at $1.2 billion, the cost of Grand Gulf 1 alone ultimately exceeded $3 billion. *Mississippi Power & Light*, 487 U.S. at 358 n.2, 359 n.5; *Middle South Energy, Inc.*, 31 F.E.R.C. ¶ 61,305, at 61,653 (1985); 30 F.E.R.C. at 65,152, 65,144-65,145; 26 F.E.R.C. at 65,099-65,103.

2. *The FERC Proceedings.*—In 1982, MSU filed two agreements with FERC. The first, a new System Agreement, set forth the terms and conditions for coordinated operations and wholesale transactions (except for transactions relating to Grand Gulf 1 power) among the operating utilities in the MSU system. The second, the Unit Power Sales Agreement (UPSA), established wholesale rates for MSE's sales of Grand Gulf 1 capacity and energy. Under the UPSA as originally filed, the operating companies were obligated to purchase the following percentages of Grand Gulf capacity: LP&L, 38.57%; MP&L, 31.63%; NOPSI, 29.80%; and AP&L, 0%.[1] The Commission assigned the 1982 System Agreement and the UPSA to separate ALJs for hearings on the question whether each agreement was "just and reasonable" as required by Sections 205(a) and 206(a) of the Federal Power Act, 16 U.S.C. 824d(a), 824e(a). 487 U.S. at 360; 31 F.E.R.C. at 61,633.

FERC consolidated review of the resulting decisions and, in June 1985, issued its order.[2] FERC found that

[1] MSE had sold a 10% share of Grand Gulf 1 to the Mississippi Electric Power Association. 31 F.E.R.C. at 61,668 n.3. The percentages in text refer to the MSU operating utilities' shares in MSE's remaining 90% interest.

[2] *Middle South Energy, Inc.*, 31 F.E.R.C. ¶ 61,305, on reh'g, 32 F.E.R.C. ¶ 61,425 (1985), aff'd *sub nom. Mississippi Industries* v. *FERC*, 808 F.2d 1525, modified, 822 F.2d 1103 (D.C. Cir.), cert. denied, 484 U.S. 985 (1987), on remand *sub nom. System Energy Resources, Inc.*, 41 F.E.R.C. ¶ 61,238 (1987), on reh'g, 42 F.E.R.C. ¶ 61,091 (1988), aff'd *sub nom. City of New Orleans* v. *FERC*, 875 F.2d 903 (D.C. Cir. 1989), cert. denied, 110 S. Ct. 1805 (1990).

"the Middle South companies constitute a highly coordinated integrated electric system" and that "this coordination and integration results in planning, construction, and operations which are conducted primarily for the system as a whole." 31 F.E.R.C. at 61,645. In keeping with the system's overall character, FERC also found that Grand Gulf 1 (like other nuclear units in the system) had been planned "to meet MP&L's needs, to meet System needs, and to meet the System goal of diversifying fuel mix." 31 F.E.R.C. at 61,653. Accord 32 F.E.R.C. at 61,958 ("We reaffirm that the Middle South companies appropriately approach power planning on a systemwide basis, whereby the individual companies' needs are the component parts of the System power plan.").

FERC determined that the UPSA would not "achieve proper cost allocation" and that "some form of equalization of nuclear plant costs is necessary to achieve just, reasonable, and non-discriminatory rates among the MSU operating companies." 31 F.E.R.C. at 61,655. An allocation that would "achieve just and reasonable results," FERC concluded, would require all of the operating companies to share in the investment costs of all of the system's nuclear units (four units, including Grand Gulf 1) "roughly in proportion to each company's share of System demand." *Id.* at 61,655-61,656. To achieve that proportionate allocation of the investment costs of the system's nuclear units, the operating companies were assigned the following shares of the investment costs of Grand Gulf 1: AP&L, 36%; LP&L, 14%; MP&L, 33%; and NOPSI, 17%. *Id.* at 61,655.[3] FERC found that this

[3] To derive these percentages, the Commission took each operating company's share of total system demand in 1982; applied it to the

Grand Gulf allocation, "coupled with the operation of the 1982 System Agreement, will result in just, reasonable, and non-discriminatory rates for the MSU operating companies." *Id.* at 61,566. See 32 F.E.R.C. at 61,950.

In reaching this conclusion, FERC rejected claims that it lacked jurisdiction to require the operating companies to assume shares of Grand Gulf costs that were different from those prescribed by the UPSA. 31 F.E.R.C. at 61,643-61,645; see 32 F.E.R.C. at 61,943-61,952. FERC also rejected arguments by various parties for different allocations of Grand Gulf costs more favorable to those parties' interests. In particular, FERC declined to accept New Orleans' argument that NOPSI should be assigned approximately 9% of the costs of Grand Gulf. See 26 F.E.R.C. at 65,097; 31 F.E.R.C. at 61,634. FERC's orders were sustained on direct review, and this Court denied certiorari. See note 2, *supra*.

3. *Mississippi Power & Light.*—When Grand Gulf 1 went on line on July 1, 1985, MSE began billing the operating utilities for their FERC-mandated shares of Grand Gulf's capacity and energy. The operating utilities, in turn, applied to state authorities for rate increases enabling them to recover those charges from retail customers. Relying on state law providing that only those costs that had been prudently incurred could be included in retail rates, the Mississippi Supreme Court held that MP&L was not entitled to a rate increase enabling it to pass on its share of Grand Gulf 1 unless it could demonstrate that its participation in the project was prudent. The state court remanded for a determination of whether "MP&L, [MSE] and MSU acted reasonably when they constructed Grand Gulf 1," making clear that this inquiry was to encompass whether MP&L's actions had been prudent "*in light of local conditions.*" *Mississippi ex rel. Pittman* v. *Mississippi Public Serv. Comm'n*, 506 So. 2d 978, 985-986 (Miss. 1987).

---

total investment costs of all nuclear units in the system; and subtracted, from the resulting figure, any investment by the utility in nuclear units other than Grand Gulf 1. The resulting figures—corresponding to each utility's responsibility for the investment costs of Grand Gulf 1—were expressed as percentages of the total cost of Grand Gulf 1. 31 F.E.R.C. at 61,655.

This Court reversed, holding that Mississippi authorities "may not enter an order 'trapping' the costs MP&L is mandated to pay under the FERC order allocating Grand Gulf power or undertake a 'prudence' review for the purpose of deciding whether to enter such an order." 487 U.S. at 372. The Court explained that "the Supremacy Clause compels the MPSC to permit MP&L to recover as a reasonable operating expense costs incurred as the result of paying a FERC-determined wholesale rate for a FERC-mandated allocation of power." *Id.* at 373.

4. *The Council's Prudence Investigation.*—In the meantime, respondent City Council of New Orleans was conducting its own inquiry into "all aspects of NOPSI's prudence regarding its decision to enter into its arrangements to purchase a portion of Grand Gulf I"; the stated purpose of this inquiry was to "determin[e] what portion, if any, of NOPSI's Grand Gulf I expense shall be assumed by its shareholders, rather than passed through to its retail ratepayers." J.A. 153 (quoting Res. R-85-636). In February 1988, the Council issued a rate order in which it found, *inter alia*, that NOPSI's "oversight and review of its Grand Gulf obligation as the project went forward was uncritical and severely deficient;" that NOPSI "made no effort to reduce its risk exposure" in the wake of the Three Mile Island nuclear incident; and that NOPSI imprudently failed to reduce the risk of its Grand Gulf commitment by "selling all or part of its share off-system" and "purchas[ing] less expensive coal-fired capacity to meet its future needs." J.A. 70-71.

In particular, the Council found that "in 1979-80, NOPSI should have sold substantially all of its Grand Gulf share off the system." J.A. 71. The Council was

"willing to assume," however, "that NOPSI might have retained a portion of Grand Gulf I relative to its comparative size within the MSU system—that is, about 9 percent of the system's Grand Gulf I obligation." J.A. 72. The Council found that the appropriate remedy for this type of imprudence—incorporating the remaining 8% of NOPSI's Grand Gulf share in the retail rate base "only at the cost level of coal-fired power"—"would cause NOPSI to become insolvent and force its bankruptcy." J.A. 72. Consequently, the Council reduced the disallowance to $135 million, an amount it determined to be 10% less than NOPSI could withstand. J.A. 72-73. The order prohibits NOPSI from recovering this sum from its retail customers. *Ibid.*

NOPSI and other parties have sought judicial review of the order in state court. The Louisiana trial and intermediate appellate courts have sustained the findings on which the disallowance was based and have rejected NOPSI's contention that the Federal Power Act preempts the Council's prudence inquiry. See Pet. Supp. App. 1A-48A. The appellate court has ruled, however, that the Council is without authority to reduce the disallowance to preserve NOPSI's solvency; consequently, its ruling would increase the disallowance to more than $400 million. *Id.* at 38A-47A. Requests for further discretionary review are pending before the Louisiana Supreme Court.

5. *The Instant Case.*—After the Council issued its order, NOPSI filed the instant action in federal district court. The complaint sought a declaratory judgment that the order was preempted by federal law as well as preliminary and permanent injunctive relief.[4]

[4] This was the third action in which NOPSI sought relief in federal court from the Council's ratemaking proceeding. The first action, filed in August 1985, sought a determination that NOPSI was entitled to pass its FERC-allocated share of Grand Gulf costs through to retail customers. The court of appeals ultimately held that the federal courts should abstain from exercising jurisdiction over this action. See *NOPSI* v. *City of New Orleans*, 782 F.2d 1236, modified, 798 F.2d 858 (5th Cir. 1986), cert. denied, 481 U.S. 1023 (1987). NOPSI's second action sought to enjoin the Council from taking any action in its prudence inquiry to require NOPSI or its shareholders to absorb any portion of the costs of Grand Gulf. That suit was dismissed, principally on the ground that it was not ripe. *NOPSI* v. *Council of the City of New Orleans*, 833 F.2d 583 (5th Cir. 1987).

a. The district court dismissed NOPSI's complaint, holding that abstention was appropriate under *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943), and *Younger* v. *Harris*, 401 U.S. 37 (1971). The court of appeals affirmed. *NOPSI* v. *Council of the City of New Orleans*, 850 F.2d 1069 (5th Cir. 1988). In June 1989, this Court reversed and remanded for further proceedings, holding that abstention was improper on either ground. *New Orleans Public Service, Inc.* v. *Council of the City of New Orleans*, 491 U.S. 350 (1989) (*NOPSI III*).

b. On remand in the district court, NOPSI moved for summary judgment on two alternative grounds: first, that the order was facially preempted and, second, that the Council's reasons for denying a pass-through were a pretext for an attack on FERC's allocation of the costs of Grand Gulf 1. Pet. App. 8A, 26A. The district court ruled that the Council's rate order was not facially preempted, finding that the order "did not question the validity of FERC's allocative decree" or "attempt to regulate interstate utility rates." *Id.* at 27A. The court entered a stay of all remaining proceedings in the case, without addressing the merits of NOPSI's argument that the Council's order was pretextual, in deference to the pending state litigation. *Id.* at 27A-32A.

c. The court of appeals affirmed. Pet. App. 2A-24A. Like the district court, the court of appeals concluded that the Council's rate order was not facially preempted. Under *Mississippi Power & Light* and this Court's other preemption decisions, the court of appeals reasoned, three specific determinations were off limits to the Council.

The Council could not "base any disallowance on NOPSI's purported imprudence in deciding to participate in Grand Gulf in the first place;" it "could not, of course, challenge the FERC price as inappropriate;" and it "could not penalize NOPSI for buying an unreasonably high amount of Grand Gulf power." *Id.* at 14A-15A. Relying on a passage from *NOPSI III*, the court of appeals concluded that the Council order did not embody any of those forbidden determinations. *Id.* at 15A (quoting *NOPSI III*, 491 U.S. at 367).

The court recognized "the well-established principle that if FERC has jurisdiction over a subject, states cannot have jurisdiction over it," and it acknowledged that *Mississippi Power & Light* confirmed that FERC (and not the States) had jurisdiction "to determine whether the various utilities acted prudently in deciding to participate in the Grand Gulf venture." Pet. App. 15A-16A. But the court understood this case to turn on "a variation of that question"—"whether FERC has jurisdiction to determine whether NOPSI acted prudently once the Grand Gulf project was underway." *Id.* at 16A.

The court concluded that FERC does not possess that jurisdiction, advancing several grounds for that conclusion. First, it found that FERC had not "assert[ed] jurisdiction to determine NOPSI's prudence in not acting to minimize its losses." Pet. App. 16A. Second, the court was reluctant to recognize federal jurisdiction that would "work the result" criticized by the dissent in *Mississippi Power & Light*—*i.e.*, that would "divest states of authority to determine the prudence of costs incurred by retail utilities" belonging to interstate power pools. *Id.* at 17A. The court insisted on "a firmer statement of intent before finding such intrusive federal jurisdiction to exist." *Ibid.* Third, the court of appeals was "convinced that [this] Court in *NOPSI III* did not believe the Council could not regulate NOPSI's activities in this regard." *Ibid.* Finally, the court reasoned that "[i]f states may deny pass throughs because costs have gone down in other areas,"

as *Nantahala* stated, "it seems logical that they should be able to deny them because costs would have gone down if the utility had not been imprudent." Pet. App. 18A.

Like the district court, the court of appeals declined to reach the merits of NOPSI's pretext claim. The court found that this claim was, in effect, a challenge to "the sufficiency of the evidence to support the Council's stated reasons for denying the pass through." Pet. App. 21A. Consequently, the court concluded, the district court's decision to stay this case in deference to the litigation pending in state court was not an abuse of discretion. *Id.* at 24A.

SUMMARY OF ARGUMENT

A. This case is a sequel to, and is controlled by, *Mississippi Power & Light*. In order to assure that members of the MSU system bear equitable shares of the costs of the system's nuclear capacity, FERC has reallocated the costs of Grand Gulf 1 among the system's members. Those costs are reflected in the rates at which the operating utilities, including NOPSI, acquire power at wholesale. FERC has determined that its allocation of Grand Gulf costs and the resulting rates are just and reasonable. *Mississippi Power & Light* specifically requires state retail ratemakers, including the Council, to recognize amounts paid pursuant to FERC's orders as reasonable. Those ratemakers may not "trap" any portion of NOPSI's FERC-mandated costs on the ground that it was imprudent for NOPSI to incur them. That is precisely what the Council's order does. Accordingly, that order is preempted.

B. It is immaterial that the Council relied on a theory of imprudence different from that advanced by state authorities in *Mississippi Power & Light*. FERC's exclusive jurisdiction over wholesale transactions among members of an integrated public utility holding company system includes the authority to allocate the costs of acquiring the system's power among the system's members

and to determine whether any portion of those costs should be excluded from wholesale rates. FERC's jurisdiction to consider all prudence issues relevant to those determinations simply leaves no room for inquiry, by retail ratemakers in any of the States in which the system operates, into the prudence of the allocations and rates mandated by FERC.

An order prohibiting a utility from recovering the cost of power that FERC has required it to buy at a price FERC has required it to pay necessarily undercuts FERC's determination that the FERC-mandated terms are just and reasonable. In this case, moreover, the Council's order intrudes on FERC's exclusive jurisdiction in three additional respects. That order distributes the costs of Grand Gulf 1 on the basis of an assumed allocation of costs different from FERC's; it embodies findings regarding the nature of the MSU system that diverge from FERC's; and it rests on an assumption concerning how FERC would have treated a hypothesized off-system sale of Grand Gulf capacity.

C. *NOPSI III* did not approve the Council's order. In that case, this Court held that the lower court should not have abstained from exercising jurisdiction over NOPSI's preemption claims, and it remanded for further proceedings on the merits. The Court's decision cannot fairly be read to address the merits of the question presented here, much less to discard well-established principles applied only the Term before in *Mississippi Power & Light*.

ARGUMENT

THE COUNCIL'S ORDER IS PREEMPTED BECAUSE IT INTERFERES WITH FERC'S EXCLUSIVE JURISDICTION TO REGULATE INTERSTATE WHOLESALE SALES OF ELECTRIC POWER AMONG THE MEMBERS OF THE MSU SYSTEM

The 1982 System Agreement and the UPSA unquestionably provide for "the sale of electric energy at wholesale in interstate commerce," 16 U.S.C. 824(b). Consequently, Section 205(c) of the Federal Power Act, 16 U.S.C. 824d(c), required the members of the MSU system to file the agreements and resulting rates with FERC.[5] FERC has exclusive jurisdiction under the Act to determine whether the rates and agreements are "unjust, unreasonable, unduly discriminatory or preferential" and, if so, to substitute just and reasonable terms. 16 U.S.C. 824e(a).

Exercising that authority, FERC has determined that "the Middle South companies constitute a highly coordinated integrated electric system" in which "planning, construction, and operations * * * are conducted primarily for the system as a whole." 31 F.E.R.C. at 61,645. The Commission's orders permit the system to include 100% of the costs of Grand Gulf 1, and of other system-owned nuclear capacity, in the wholesale rates that members of the system charge one another; they also allocate the costs of Grand Gulf so as to assure that each operating company's contribution to the total costs of the system's nuclear generating capacity is in proportion to the company's share of demand for the system's power. This allocation, FERC has declared, "will result in just, rea-

[5] Under this provision, utilities must file "schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services." 16 U.S.C. 824d(c).

sonable, and non-discriminatory rates for the MSU operating companies." *Id.* at 61,656. NOPSI is obligated by federal law to pay those rates for the power it obtains from the MSU system.[6]

A. *Nantahala* and *Mississippi Power & Light* Specifically Foreclose The Council's Disallowance Of FERC-Mandated Costs

The Council's order would prevent NOPSI from recovering from retail ratepayers the very costs that FERC has determined are just and reasonable. This Court's holdings in *Mississippi Power & Light* and *Nantahala* squarely preclude such an order. As those cases recognize, once FERC has allocated power among members of an integrated public utility holding company system and has established the rates for such power, States are required to honor those determinations in setting retail rates. As this Court declared in *Mississippi Power & Light*, 487 U.S. at 373:

> In this case as in *Nantahala* we hold that "a state utility commission setting retail prices must allow, as reasonable operating expenses, costs incurred as a result of paying a FERC-determined wholesale price. . . . Once FERC sets such a rate, a State may not conclude in setting retail rates that the FERC-approved wholesale rates are unreasonable. A State must rather give effect to Congress' desire to give FERC plenary authority over interstate wholesale rates and to ensure that the States do not interfere with this authority." *Nantahala*, 476 U.S., at 965, 966. Thus, we conclude that the Supremacy Clause compels the MPSC to permit MP&L to recover as a reasonable operating expense costs incurred as the result of paying a FERC-determined wholesale rate for a FERC-mandated allocation of power.

---

[6] *Mississippi Power & Light*, 487 U.S. at 371; *Nantahala*, 476 U.S. at 963-964; *Montana-Dakota Utilities Co.* v. *Northwestern Public Serv. Co.*, 341 U.S. 246, 251-252 (1951).

The fact that the Council has couched its order in terms of NOPSI's asserted imprudence, and has disclaimed any intention of contradicting the FERC-mandated rate and allocation, is wholly immaterial. As in *Mississippi Power & Light*, 487 U.S. at 372, the Council "may not enter an order 'trapping' the costs [NOPSI] is mandated to pay under the FERC order allocating Grand Gulf power or *undertake a 'prudence' review for the purpose of deciding whether to enter such an order*" (emphasis added). The Council's order disallowing $135 million (and the intermediate appellate court's order increasing that sum to more than $400 million) would do precisely that.

B. The Fact That The Council's Disallowance Is Tied To NOPSI's Assertedly Imprudent Failure To Sell Off Its Grand Gulf Participation Is Immaterial

The Council's essential contention, which the court of appeals adopted, is that *Mississippi Power & Light* leaves room for a state prudence inquiry into whether the operating utilities in the MSU should have foreseen FERC's allocation of the system's nuclear costs, sold their respective shares of Grand Gulf capacity, and replaced that capacity with lower-cost coal-fired capacity. In the Council's view, there is a distinction between "(1) the decisions of *intercompany* consequence to *undertake*, to *construct*, and to *complete* the Grand Gulf 1 project, as well as the intercompany *allocation* of costs—all within the FERC's jurisdiction" and "(2) the option available to NOPSI to reduce its risks (and protect its ratepayers) through off-system sales of power—an option that was entirely consistent with both the construction of the plant and the FERC's allocations to NOPSI." Br. in Opp. 3-4. See Pet. App. 14A-15A, 16A. For purposes of federal preemption, the distinction is nonexistent. Just as FERC had exclusive jurisdiction to consider the contention that MP&L acted imprudently, it also had exclusive jurisdiction to consider the Council's prudence theory. A state

ruling on either prudence issue entails the same interference with FERC's exclusive authority.

1. *FERC Had Jurisdiction To Determine Whether It Was Imprudent For NOPSI To Retain Its Interest In Grand Gulf*

As the court of appeals correctly recognized, "if FERC has jurisdiction over a subject, states cannot have jurisdiction over it." Pet. App. 15A-16A. Further, because the Federal Power Act preempts the field assigned to FERC, "the pre-emptive effect of FERC jurisdiction" does not turn on "whether a particular matter was actually determined in the FERC proceedings." *Mississippi Power & Light*, 487 U.S. at 374. The Federal Power Act establishes a "bright line" between state and federal authority. *FPC* v. *Southern California Edison Co.*, 376 U.S. 205, 215-216 (1964). When Congress established federal jurisdiction over public utility "sales for resale in interstate commerce," it "left no power in the states" to regulate those transactions. *United States* v. *Public Utilities Comm'n*, 345 U.S. 295, 311 (1953).

a. In this case, FERC determined that the MSU operating companies are members of an integrated system in which "planning, construction, and operations * * * are conducted primarily for the system as a whole" (31 F.E.R.C. at 61,645). In such a system, FERC's exclusive authority to review the terms of transactions among members encompasses two basic issues. The first is what costs may be reflected in wholesale rates; the answer to that question determines the extent to which those costs will be paid by wholesale purchasers, as opposed to being absorbed by shareholders. Here, FERC's orders establish that 100% of the system's Grand Gulf 1 costs are to be included in the wholesale rates for Grand Gulf power. The second question is how costs included in rates are to

be allocated among purchasers of power.[7] Here, FERC allocated the costs of Grand Gulf 1 and other nuclear capacity in proportion to the operating utilities' shares of system demand.

In *Mississippi Power & Light*, this Court held that FERC's authority over these issues leaves no room for a third inquiry, by retail ratemakers, into whether it was prudent for an individual operating utility to participate in the Grand Gulf project. The Court reasoned that "the prudence of the investment in Grand Gulf * * * was a matter FERC easily could have considered in determining whether to permit MSE to recoup 100% of the costs of Grand Gulf in the wholesale rates it charged to the four operating companies and in allocating Grand Gulf power." 487 U.S. at 375. Moreover, because FERC had "rejected * * * the argument that decisions about the allocation of Grand Gulf costs should be made in light of the needs of any one of the operating companies," the Court continued, FERC's order "specifically bars a state regulatory agency from evaluating the prudence of Grand Gulf 'in light of local conditions' alone." *Id.* at 376. The Court concluded that "[t]he MPSC cannot evaluate either the prudence of MSU's decision to invest in Grand Gulf and bring it on line or the prudence of MP&L's decision to be a party to agreements to construct and operate

---

[7] A decision that operating utilities are members of an integrated system does not, of course, require that costs be allocated among system members in precise proportion to their participation in the system. As in this case, members of a system may choose to structure arrangements that preserve some measure of individual autonomy—and some cost differentials—among individual companies. See 32 F.E.R.C. at 61,959. If those agreements are just and reasonable, they will be approved by FERC. Similarly, if FERC determines that such arrangements are unjust, unreasonable, or unduly discriminatory or preferential, it may choose to preserve other differentials that are consistent with its statutory responsibility.

Grand Gulf without traversing matters squarely within FERC's jurisdiction." *Ibid.*[8]

Nothing in this Court's reasoning was limited to the particular form of imprudence at issue in *Mississippi Power & Light*. Nor is any such limitation logically possible. The essential function of the FERC proceeding was to determine whether to include the full costs of Grand Gulf in rates charged among members of the MSU system and the proper allocation of those costs. Accordingly, any assertions that Grand Gulf costs should have been disallowed by FERC because the project was imprudent from the outset, should have been abandoned, was executed in an unnecessarily costly fashion, or should have been sold off-system were within FERC's jurisdiction to determine.[9] The crux of any such claim, regardless of

[8] A concurring opinion by Justice Scalia similarly relied on the fact that "FERC asserts jurisdiction to inquire into the prudence of a part[illegible]tility's entering the arrangement." 487 U.S. at 379 (Scalia, J.[illegible]urring in the judgment). The common ground of the majority and concurring opinions is that the inquiries FERC may undertake foreclose any possibility of a separate state inquiry into prudence. *Id.* at 383 ("After today, the battle will no longer be over who has jurisdiction, FERC or the States, to evaluate the prudence of a particular utility's entering pooling arrangements with affiliated companies for the sharing of electrical generating capacity or the creation and wholesaling of electrical energy."). By contrast, the dissenting opinion argued that the States should be allowed to engage in such an inquiry. *Mississippi Power & Light*, 487 U.S. at 383-384 (Brennan, J., dissenting). At the risk of stating the obvious, the court of appeals was mistaken in relying on the reasoning of the dissent, which a majority of the Court rejected. See Pet. App. 17A. Cf. *United States Railroad Retirement Bd.* v. *Fritz*, 449 U.S. 166, 177 n.10 (1980) ("The comments in the dissenting opinion * * * are just that: comments in a dissenting opinion.").

[9] In fact, FERC has considered claims that it was imprudent for a utility to fail to sell off nuclear power while construction of the plant was underway. For instance, in *Connecticut Power & Light Co.*, 43 F.E.R.C. ¶ 63,029 (1988), aff'd, 48 F.E.R.C. ¶ 61,139 (1989), a state public utility commission argued in a FERC proceeding that a portion of the costs of a nuclear plant should be disallowed because

the form of imprudence asserted, is necessarily (i) that some portion of the cost of Grand Gulf 1 should be excluded from the rate base used to establish the FERC-mandated rates or (ii) that the costs incurred by the system were disadvantageous to a particular utility, relative to other members, in a manner justifying reducing its share.[10]

a utility had not "seriously pursue[d] the desirability of a sell-off in entitlements" to the plant's power. 43 F.E.R.C. at 65,219. An ALJ rejected that contention on the ground that "the sell-down of entitlements in [the nuclear plant] was neither a practical nor desirable solution to the financial problems faced by the utility in the late 1970's," 43 F.E.R.C. at 65,228, and the Commission upheld that determination, 48 F.E.R.C. at 61,546. The Council advanced precisely the same theory in its prudence inquiry. See also *Arizona Public Serv. Co.*, 25 F.E.R.C. ¶ 63,025 (1983), aff'd, 27 F.E.R.C. ¶ 61,185, at 61,350 (1984) (considering the "prudence of [a utility's] action in keeping, rather than selling, a plant").

Connecticut Power & Light and other cases demonstrate that the Commission considers a wide variety of prudence claims. See *New England Power Co.*, 31 F.E.R.C. ¶ 61,047, at 61,081-61,087 (1985), aff'd *sub nom. Violet* v. *FERC*, 800 F.2d 280 (1st Cir. 1986); *Kansas Gas & Electric*, 39 F.E.R.C. ¶ 63,013, at 65,058-65,069 (1987), aff'd, 49 F.E.R.C. ¶ 61,295 (1989). There is no regulatory gap in which the Council may operate. All imprudence claims whose purpose is to determine whether FERC-mandated costs "should be 'trapped' or passed on to * * * retail customers" (*Mississippi Power & Light*, 487 U.S. at 372 n.12) are subsidiary to (and thus encompassed by) FERC's exclusive jurisdiction to establish wholesale rates.

[10] Specifically, there was no obstacle to presentation of the Council's imprudence theory in the FERC proceeding. The Council could have argued, for instance, that it was imprudent for MSE to have failed to sell more than 10% of Grand Gulf off-system. If FERC had agreed with such a contention, it could have disallowed a corresponding portion of Grand Gulf costs from the rates charged to NOPSI and other operating utilities. Alternatively, the Council could have argued that, even if any failure to make off-system sales was prudent from the standpoint of the system as a whole, circumstances that distinguished NOPSI from other utilities with respect to that issue made it appropriate to reduce NOPSI's relative share. What the Council could not do was withhold both arguments and then seek to address a matter encompassed by those issues in its

There is no room left for a state prudence inquiry. It is logically impossible for the following three propositions to coexist: (1) the costs to be recovered in wholesale rates from members of the MSU system for Grand Gulf power (by virtue of the decision to build the facility, the execution of the project, and any asserted failure to sell more than 10% of the project's capacity) are prudent; (2) the costs assigned to each utility are just and reasonable in view of their particular circumstances; and (3) it is imprudent for one or more of the utilities to bear the resulting wholesale rates.

b. The court of appeals thus erred in insisting upon a "firmer statement of [congressional] intent" to preempt the Council's particular prudence theory. Pet. App. 17A. In *Mississippi Power & Light*, this Court did not require any specific demonstration that Congress meant to foreclose Mississippi's precise theory of imprudence when it found that State's inquiry into that subject preempted. Congress's grant to FERC of exclusive jurisdiction over wholesale rates and matters affecting those rates is sufficient to demonstrate an intention to "legislate[] comprehensively to occupy [that] entire field of regulation." *Northwest Central Pipeline Corp.* v. *Kansas*, 489 U.S. 493, 509 (1989).

The court also erred in relying on a finding that FERC "did not assert jurisdiction to determine NOPSI's prudence in not acting to minimize its losses." Pet. App. 16A. To begin with, the Commission *did* recognize that its reallocation of Grand Gulf costs would preclude contrary action by state retail ratemakers.[11] More fundamentally, it is immaterial whether FERC declared its jurisdiction over the precise form of imprudence relied on by the Council. As this Court made clear in *Mississippi Power & Light*, preemption in this context does not turn on whether FERC has actually *addressed* an issue, and the Commission is not obligated to identify and affirmatively declare its jurisdiction over an issue to preserve its exclusive *authority* under the Federal Power Act.[12]

own retail ratemaking proceeding. "The reasonableness of rates and agreements regulated by FERC may not be collaterally attacked in state or federal courts. The only appropriate forum for such challenge is before the Commission or a court reviewing the Commission's order." *Mississippi Power & Light*, 487 U.S. at 375. See *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320, 336 (1958).

[11] See 30 F.E.R.C. at 65,148-65,151; 31 F.E.R.C. at 61,644; 32 F.E.R.C. at 61,951-61,952 & n.9. Moreover, one of the principal objections to FERC's orders was that they would unduly displace state retail ratemakers. The D.C. Circuit acknowledged that FERC's orders would be binding on state ratemakers, but nevertheless upheld them. *Mississippi Industries*, 808 F.2d at 1548-1549. Citing *Nantahala*, the court explained that "FERC plainly had authority to approve or reject the cost allocation pursuant to its jurisdiction over wholesale interstate rates despite its inevitable impact on retail rates." *Id.* at 1548.

[12] *Mississippi Power & Light*, 487 U.S. at 375 ("[t]he question of prudence was not discussed * * * because no party raised the issue, not because it was a matter beyond the scope of FERC's jurisdiction"); *id.* at 379 (Scalia, J., concurring in the judgment) ("It is true, of course, that FERC did not conduct [a prudence] examination in the present case; but, * * * neither did any party ask it to do so. That failure to ask does not take the issue out of FERC's jurisdiction and recommit it to the States."). See *Schneidewind* v. *ANR Pipeline Co.*, 485 U.S. 293, 300 (1988); *Northwest Central Pipeline Corp.* v. *Kansas Corp. Comm'n*, 489 U.S. 493, 509 (1989); *FPC* v. *Southern California Edison Co.*, 376 U.S. 205, 215-216 (1964).

2. *The Council's Order Undercuts FERC's Ratemaking Authority*

In a purely formal sense, the Council's prudence order does not relieve NOPSI of the duty to pay for power it draws from the MSU system at the rates prescribed by FERC's orders. But the same could be said of the order contemplated by the proceeding at issue in *Mississippi Power & Light*, and, like that proceeding, the Council's order is preempted nevertheless. The significance of FERC's orders within the scheme of the Federal Power Act is not limited to the legal obligation imposed on

system members to purchase specified amounts of MSU system power at prescribed rates. Those orders also establish that, in purchasing the power allocated to it by FERC at FERC-mandated rates, each utility is assuming a just, reasonable, and non-discriminatory share of system costs that have been prudently incurred. States are not free to reach a different conclusion or to circumvent the Commission's determination. As this Court recognized in *Mississippi Power & Light*, "the Supremacy Clause compels the MPSC to permit MP&L to recover as a reasonable operating expense costs incurred as the result of paying a FERC-determined wholesale rate for a FERC-mandated allocation of power." 487 U.S. at 373.

In this case, the Council determined that "NOPSI should have sold substantially all of its Grand Gulf share off the system" (although it was "willing to assume" that 9% of Grand Gulf's costs could be included in NOPSI's rates). J.A. 71-72. If the Council has the power to determine that NOPSI's retail rates should be calculated as if some or all of its Grand Gulf power came from other sources, all of the other interested retail ratemakers must have the same authority. The upshot would be that while FERC could declare that all of the costs of Grand Gulf capacity could reasonably be included in wholesale rates, the States could respond that none of the utilities could pass on the same costs to retail customers. Since all of the operating companies in the system at issue are wholly owned subsidiaries of MSU, the States would have the power to reduce FERC's ruling to an empty gesture. The fact that the Council has been alone in asserting this form of imprudence and that it has stopped short of a complete disallowance does not alter the fundamental contradiction between its order and FERC's authority.

This fundamental contradiction is present whenever a state retail ratemaker disallows a portion of the costs of purchasing a FERC-mandated allocation of power at a FERC-mandated rate. In the circumstances of this case,

moreover, the Council's order interferes with FERC's exclusive jurisdiction in three additional respects:

First, the Council's order effectively reallocates the costs of Grand Gulf capacity. FERC's orders were based on the premise that 10% of Grand Gulf's capacity was sold off-system (see note 1, *supra*) and that the remaining 90% was allocated in accordance with the percentages in FERC's order. The Council's order rests on the assumption that an additional 8% was sold off-system to a hypothetical buyer and that a correspondingly lower percentage was attributed to NOPSI. The fact that the difference is attributed to NOPSI's allegedly imprudent failure to sell that capacity rather than an imprudent purchase is immaterial. NOPSI has been penalized for paying a higher portion of Grand Gulf costs—costs that are reflected in its FERC-mandated wholesale rates—than the Council has determined to be reasonable.[13] To paraphrase *Mississippi Power & Light*, 487 U.S. at 374, "if the integrity of FERC regulation is to be preserved, it obviously cannot be unreasonable for [NOPSI] to procure the particular quantity of high-priced Grand Gulf power that FERC has ordered it to pay for. Just as Nantahala had no legal right to obtain any more low-cost TVA power than the amount allocated by FERC, it is equally clear that [NOPSI] may not pay for less Grand Gulf power than the amount allocated by FERC."

---

[13] For that reason, it is far from clear that the Council's order falls even within the realm that the dissent in *Mississippi Power & Light Co.*, 487 U.S. at 391, would have reserved for state prudence inquiries. In the dissent's view, *Mississippi Power & Light* involved two separate prudence issues: (1) whether "treating [the utility's] participation [in Grand Gulf] as a given" it was imprudent for it to purchase such a high amount of expensive Grand Gulf power; and (2) whether the utility's decision to participate in Grand Gulf in the first place was imprudent. 487 U.S. at 383-384. The dissent recognized that, under *Nantahala*, the first was off-limits to the State. As shown, the Council's determination is indistinguishable in substance from that first inquiry.

Second, the theory underlying the Council's disallowance is at odds with FERC's findings regarding the system and the Grand Gulf project. FERC specifically found that Grand Gulf 1 was undertaken "to meet MP&L's needs, to meet System needs, and to meet the System goal of diversifying fuel mix." 31 F.E.R.C. at 61,653. FERC incorporated in its order the finding of one of its ALJs that "continuing construction of Grand Gulf Unit No. 1 was prudent because Middle South's executives believed Grand Gulf would enable the Middle South system to diversify its base load fuel mix and, it was projected, at the same time, produce power for a total cost (capacity and energy) which would be less than existing alternatives on the system." 26 F.E.R.C. at 65,112-65,113. The theory underlying the Council's order, by contrast, is that NOPSI should have acted alone to substitute coal-fired power for nuclear power. FERC's determination that the full costs of Grand Gulf could be reflected in the system's wholesale rates, based on its findings regarding the plant's role in a systemwide plan to diversify generating capacity, is inconsistent with the Council's determination that NOPSI should have pursued an independent course.

Third, the Council's order embodies an assumption about how FERC would have treated the sales that NOPSI was faulted for failing to have made. According to the Council, NOPSI should have sold its share of Grand Gulf 1 in 1979 or 1980. FERC did not undertake to allocate the costs of Grand Gulf 1 until later. Even if we assume that NOPSI could have succeeded in entering into transactions obligating buyers to assume 8% of Grand Gulf's capacity (the difference between the 17% FERC was later to impose and the 9% the Council was willing to include in retail rates) at the rates later to be imposed on NOPSI, the savings projected by the Council would still have been contingent on FERC's allowing the entire benefit of those transactions to remain with NOPSI. This Court has made clear, however, that no tribunal may

"speculat[e] about what the Commission might have done had it been faced with the facts of this case." *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571, 579 (1981).[14]

C. *NOPSI III* Did Not Approve The Council's Prudence Inquiry

The court of appeals found support for its conclusion in a passage in this Court's opinion in *NOPSI III*, 491 U.S. at 367. In that case, NOPSI argued that an exception to the *Younger* doctrine for challenges to "state statute[s] 'flagrantly and patently violative of express constitutional prohibitions'" should be extended to this case. See 491 U.S. at 366-367. The Court found it unnecessary to resolve that contention, "since the proceeding and order at issue do not meet that description." *Id.* at 367. The Court continued (*ibid.*):

---

[14] The Council's order finds no support, contrary to the court of appeals' view (Pet. App. 17A-18A), in the principle that FERC-mandated costs may be offset by cost savings in areas not subject to FERC's jurisdiction. See *Nantahala*, 476 U.S. at 967-968 (recognizing that wholesale and retail rates could diverge "only if costs *other than* those resulting from the purchase of FERC-regulated power * * * were to decrease"). The Council's order does not offset amounts paid for wholesale power under FERC-mandated rates with other savings outside FERC's jurisdiction. The Council has disallowed the FERC-mandated costs themselves, on the basis of as assumption about how FERC would have handled a hypothetical sale.

Likewise, the court of appeals correctly rejected the Council's reliance on the *Pike County* line of cases. Pet. App. 15A. See, *e.g.*, *Kentucky West Virginia Gas Co.* v. *Pennsylvania Public Utility Comm'n*, 837 F.2d 600 (3d Cir.), cert. denied, 488 U.S. 941 (1988); *Pike County Light & Power Co.* v. *Pennsylvania Public Utility Comm'n*, 77 Pa. Comm. 268, 273-274, 465 A.2d 735, 737-738 (1983). Those cases hold that when a utility has a legal right to refuse to buy power subject to FERC's jurisdiction, retail ratemakers may consider whether the purchase was prudent. They do not apply when, as in this case, FERC has determined the amount of power that each operating utility in an interstate pool is obligated to purchase. See *Mississippi Power & Light*, 487 U.S. at 373-374.

> The Council has not sought directly to regulate interstate wholesale rates; nor has it questioned the validity of FERC-prescribed allocation of power within the Grand Gulf system, or the FERC-prescribed wholesale rates; nor has it reexamined the prudence of NOPSI's agreement to participate in Grand Gulf 1 in the first place. Rather, the Council maintains that it has examined the prudence of NOPSI's failure, after the risk of nuclear power became apparent, to diversify its supply portfolio, and that finding that failure negligent, it has taken the normal ratemaking step of making NOPSI's shareholders rather than the ratepayers bear the consequences. Nothing in this is directly or even indirectly foreclosed by the federal statute, the regulations implementing it, or the case law applying it.

Contrary to the court of appeals' suggestion (Pet. App. 17A), this passage cannot fairly be taken as an indication that this Court "did not believe the Council could not regulate NOPSI's activities in this regard." The only issue before the Court in *NOPSI III* was the "threshold question" whether the district court "properly abstained from exercising jurisdiction in deference to the state review process." 491 U.S. at 353. Whether the order itself was valid was "not at issue." *Ibid.* Indeed, as the court below correctly recognized in another portion of its opinion, *NOPSI III* "held only that the [Council's] order was not 'flagrantly' unlawful for *Younger* abstention purposes; it did not hold the facial preemption claim was foreclosed." Pet. App. 10A.

Just one Term earlier, in *Mississippi Power & Light*, this Court reaffirmed the principle that FERC-mandated allocations of power and wholesale rates are binding in state retail ratemaking proceedings. *NOPSI III* cannot fairly be read to repudiate that principle—which controls this case.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

JOHN G. ROBERTS, JR.
Acting Solicitor General *

LAWRENCE G. WALLACE
Deputy Solicitor General

STEPHEN L. NIGHTINGALE
Assistant to the Solicitor General

WILLIAM S. SCHERMAN
General Counsel

JEROME M. FEIT
Solicitor

THOMAS J. LANE
Attorney
Federal Energy Regulatory Commission

JULY 1991

---

* The Solicitor General is disqualified in this case.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1991 282061 20618